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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a petition for a writ of habeas corpus asserting a claim of error under *Cage v. Louisiana*, 498 U.S. 39 (1990), relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A) [the Anti-Terrorism and Effective Death Penalty Act].

II.

Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Melvin Tyler
2. Burl Cain, Warden
3. The State of Louisiana

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Respondent

Petitioner Melvin Tyler respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 1, 2000, to address the important question of federal law presented herein, and to resolve the conflict among the federal Courts of Appeals on this question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *Tyler v. Cain*, #98-31159 (June 1, 2000), which is not reported. A copy of the opinion is attached to this petition as Appendix A. The "Memorandum and Order" of the United States District Court for the Eastern District of Louisiana denying Tyler's petition for post-conviction relief pursuant to 28 U.S.C. § 2254 is also unreported. This "Memorandum and Order" is attached to this petition as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In April, 1997, petitioner Melvin Tyler, who is in the custody of the State of Louisiana, sought and received authorization from the United States Court of Appeals for the Fifth Circuit to file a successive petition for a writ of habeas corpus (28 U.S.C. § 2254) in the United States District Court for the Eastern District of Louisiana. However, the Court of Appeals limited the successive petition to the questions of whether this Court's decision in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) should be applied retroactively, and if so, whether the jury charge given at Tyler's trial was unconstitutional.[1]

In its order dated September 10, 1998, which is attached as Appendix B, the district court held that *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) must be applied retroactively, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir., 1998)(Memorandum and Order, Appendix B, p.4).

However, the district court denied petitioner Tyler relief, even though the "reasonable doubt" portion of the jury charges given at his trial was indistinguishable from the one struck down by this Court in *Cage*. In the view of the district court, the Anti-terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254 (d)(1), changed the standard of review for state habeas petitioners, and under the "new" standard of review, a '*Cage*-type' instruction like the one given at Tyler's trial was in fact constitutional (Memorandum and Order, Appendix B., pp.8-10).

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[1] The jury charge Tyler complained of was almost identical to the one condemned by this Court in *Cage*. Like the instruction in *Cage*, Tyler's jury instruction contained the phrases: "*It must be such a doubt as would give rise to a grave uncertainty* raised in your minds by reasons of the unsatisfactory character of the evidence; one that would make you feel that you had not *an abiding conviction to a moral certainty of the defendant's guilt.* • • • *It should be an actual or substantial doubt.*"

In his appeal to the Court of Appeals for the Fifth Circuit, Tyler contended that AEDPA did not change the standard of review for state habeas petitioners. Even assuming that it did, however, Tyler argued that under the "new" standard of review, this Court's decisions in *Cage* and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993) were still controlling, and that accordingly, the jury instructions given at his trial were unconstitutional. Tyler further contended that these decisions should be given retroactive effect on collateral review.

The Court of Appeals did not reach the substantive issues, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir.1999), which relies on In re Smith, 142 F.3d 832 (5th Cir.1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).
> (Appendix A, p.2).

This opinion was issued on June 1, 2000. Consequently, this Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Supreme Court Rule 13.3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

STATEMENT OF THE CASE

1. INTRODUCTION

Two years ago, in August, 1998, undersigned counsel, acting on behalf of the petitioner Gregory Smith, filed a petition for a writ of *habeas corpus* with this Honorable Court. In that petition, docketed as proceedings #98-5804, Gregory Smith sought to invoke the original jurisdiction of this Court, to present the same two questions being presented in this petition.

In response to Gregory Smith's petition, this Court directed the State of Louisiana to file a brief, and invited the Solicitor General of the United States to file a brief. In the Brief for the United States as Amicus Curiae, the Solicitor General concluded that "[t]he application for a petition for a writ of habeas corpus should be set for full briefing and argument on its merits."

This recommendation notwithstanding, the Court denied Gregory Smith's petition on June 7, 1999, with a notation that "Justice Stevens, Souter, and Breyer would set the case for full briefing."

As a result of this denial, an additional two years have passed with no final resolution of issues of great legal import: did this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990), announce a new rule of constitutional law, one that must be applied retroactively to cases on collateral review? Although most federal courts that have considered the question have concluded that it did, *see e.g., Humphrey v. Cain*, 138 F.3d 552 (5th Cir.)(*en banc*), *cert. denied*, 525 U.S. 935, 119 S.Ct. 348, 365 (1998), for most circuits, it is this Court's determination that is critical.

During these two years, many federal courts have been denying relief to petitioners with '*Cage* claims,' because of the absence of a clear statement from this Court that *Cage* did announce a new rule of law, one that must be applied retroactively. *See, e.g., In re Gregory Smith*, 142 F.3d

832 (5th Cir.1998); *Brown v. Lensing*, 171 F.3d 1031(5th Cir.1999). State courts in these circuits, in turn, have been denying relief, because they do not consider themselves bound by any federal court decisions other than those coming directly from this Court:

> The decision in *Humphrey*[*v. Cain, supra*](or *Wilson* [*v. Cain*, 199 F.3d 439 (5th Cir.1999)) might constitute persuasive authority but will not bind this Court in our interpretation of what federal constitutional law generally requires. * * * (citations omitted). * * *
>
> Unless and until the United States Supreme Court resolves the status of a *Cage/Humphrey* instruction after *Victor* [*v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239 (1994)], our decisions in [*State v.*] *Smith* [637 So.2d 398, *cert. denied*, 513 U.S. 1045, 115 S.Ct. 641 (1994)] and [*State v.*] *Williams*, [708 So.2d 703 (La.1998] as well as our decision in *State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992)(*Cage* not retroactively applicable to final convictions subject only to collateral attack), and not the decision in *Humphrey*, bind the district courts of this state in reviewing claims that trial judges have read erroneous instructions on reasonable doubt. *See generally* Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1046-1054 (1977).
> *State v. Penns*, 758 So.2d 776 (La.1999).

The net result of these two lines of cases has been to turn this Court's decision in *Cage* into an historical artifact, one with no relevance or meaning to those petitioners whose convictions were obtained through the use of constitutionally flawed jury instructions. This petition presents the Court with the opportunity to revivify *Cage*.

2. THE SPECIFIC FACTS OF THIS PROCEEDING

On March 20, 1975, petitioner Melvin Tyler got into a fight with his girlfriend over whether she would reconcile with her husband. After drinking himself into a rage, he went to her house, stood in the alleyway outside her house, and fired a .22 caliber pistol into a draped and enclosed window. Unbeknownst to him, Tyler's nineteen year-old daughter lay asleep under the window. Tyler's shots caused her death. Tyler was arrested, prosecuted, and convicted of second-degree

murder in the Criminal District Court for the Parish of Orleans, State of Louisiana -- the same court that gave rise to this Court's decisions in *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). See *State v. Tyler*, 363 So.2d 903 (La.1979).

After his conviction and sentence of life imprisonment were affirmed by the Louisiana Supreme Court, Tyler began seeking post-conviction relief, in both state and federal court. Included in these efforts were five petitions for post-conviction relief in the Louisiana courts. *See State ex rel. Tyler v. Maggio*, 428 So.2d 483 (La.1982); *State v. Tyler*, 430 So.2d 92 (La.1983); *State ex rel. Tyler v. State*, 437 So.2d 1142 (La.1983); *State v. Tyler*, 446 So.2d 1226 (La.1984) and *State ex rel. Tyler v. Blackburn*, 494 So.2d 1171 (La.1986).

In 1990, this Court handed down its decision in *Cage, supra*. Because the jury instruction regarding "reasonable doubt" that was given at Tyler's trial was virtually identical to the instruction condemned in *Cage*,[2] in 1995, Tyler filed his sixth petition for post-conviction relief in the state

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[2] At petitioner Tyler's trial, reasonable doubt was defined as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.
>
> This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration of all the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a

district court raising *inter alia*, a *Cage* claim, *i.e.*, a claim that his jury had been given an erroneous instruction regarding reasonable doubt. This claim had not previously been raised by Tyler. This petition was denied by the Louisiana Supreme Court in December 1996. *State ex rel. Tyler v. Cain*, 684 So.2d 950 (1996).

Having exhausted his state remedies, Tyler turned to federal court. In April, 1997, Tyler filed a petition in the United States Court of Appeals for the Fifth Circuit for authorization to file a successive petition for federal habeas relief (28 U.S.C. § 2254). *See* the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(A), which provides as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The Court of Appeals granted Tyler leave to file the successive application, but limited the successive application to "whether Cage v. Louisiana 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt was unconstitutional under Cage and Victor v. Nebraska, 511 U.S. 1 . . . ."

Thereafter, Tyler presented his *Cage* claim to the district court, and the Court of Appeals, both of which denied relief, for the reasons noted above. Hence this petition.

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reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

REASONS FOR GRANTING THE PETITION

On its face, the opinion of the Court of Appeals for the Fifth Circuit purports to be a simple and straightforward application of a clear statute to an undisputed set of facts. Behind this opinion, however, are dilemmas which are one part Lewis Carroll, and one part Franz Kafka. Because of the holding in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998)(*en banc*), the Fifth Circuit, and every federal district court in the Fifth Circuit must apply *Cage* retroactively, unless, however, the federal petition is a successive one, in which case relief will be denied, because this Court has never held that *Cage* is to be given retroactive application -- at least in the eyes of the Court of Appeals for the Fifth Circuit.

Every other court of appeals to have addressed the issue has also interpreted this Court's rulings to require the retroactive application of *Cage*. But under the Fifth Circuit's application of the law, the unanimous view of the federal courts on this issue is to be disregarded. Indeed, the very unanimity of the federal courts on the question of retroactivity may have the effect of making it more difficult to for a successive habeas petitioner to surmount the procedural obstacles created by the AEDPA, given this Court's disinclination to decide issues as to which there is no disagreement among the courts of appeals.

These circumstances are legally absurd. They are, however, the inevitable result of interpreting the statute to direct the courts of appeals to disregard any judicial finding of retroactivity that does not come from the Supreme Court -- even if the finding is one of their own. Such legislation stands *Marbury v. Madison*, 5 U.S. 137 (1803) on its head.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND IN A WAY WHICH IS IN CONFLICT WITH TWO OTHER CIRCUIT COURTS OF APPEALS.

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a jury instruction which defines reasonable doubt in a manner that allows a finding of guilt based on a degree of proof below that required by the Due Process Clause is improper, and grounds for reversing a conviction obtained using such an instruction.

Three years later, in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that a constitutionally deficient reasonable doubt instruction, such as the one given in *Cage*, cannot be harmless error, but is instead "structural error," and thus outside the entire harmless error analysis. In the words of the Court:

> In *[Arizona v.] Fulminante*, [499 U.S. 279 (1991)] we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.*, at 307-308. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose* [*v. Clark*, 478 U.S. 570 (1986)], *supra*, 478 U.S. at 577. The right to trial by jury reflects, as we have said, " a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S., at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 508 U.S. at 283.

Plainly, *Cage*, as explained by *Sullivan*, announced a new rule of law.[3] The result in *Cage*

[3] While *Sullivan* was soon followed by *Victor v. Nebraska*, 511 U.S. 1 (1994), *Victor* changed neither the Court's holding in *Cage*, nor *Sullivan*'s determination that when a reasonable doubt jury instruction is constitutionally deficient, it is not subject to a harmless error analysis.

certainly "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Thus, every lower court to consider the question has found that in deciding *Cage*, this Court "announced a new rule [of law]." See, *e.g.*, *Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir.1992), *vacated and remanded*, 511 U.S. 1001 (1994), *Humphrey v. Cain, supra, Nevius v. Sumner*, 103 F.3d 453 (9th Cir.1996), *Nutter v. Whitley*, 950 F.2d 1037 (11th Cir.1994), *In re Hill*, 113 F.3d 181 (11th Cir.1997), and *West v. Vaughn*, 204 F.3d 53 (3rd Cir.2000). As the Fifth Circuit wrote in *In re Gregory Smith, Movant*, 142 F.3d 832, 835 (5th Cir.1998):

> It is undisputed that *Cage* announced a new rule of constitutional law. *See Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 2083, 124 L.Ed. 2d 182 (1993)(denying right to beyond-reasonable-doubt-jury-verdict is structural defect that takes away "basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.").

Certainly, as a new rule of law, *Cage* cannot be applied retroactively to cases on collateral review, unless it falls into one of the two *Teague* exceptions: (1) if the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague v. Lane*, *supra*, 489 U.S. at 307 (citation omitted), or (2) if the new rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* (citation omitted).

However, given this Court's determination that a *Cage* error "unquestionably qualifies as 'structural error,'" the conclusion appears inescapable: a *Cage* error falls under the second *Teague* exception, and the ruling in *Cage* should be applied retroactively to cases on collateral review. This,

Rather, in *Victor* the Court simply determined that the two "reasonable doubt" jury instructions before it were not constitutionally deficient. ("In these two cases, we consider the constitutionality of two attempts to define 'reasonable doubt.'" *Victor*, 511 U.S., 1, 3 (1994)).

of course, is precisely the conclusion reached by the Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998)(*en banc*)[4]. And it appears to be the conclusion this Court has already reached in connection with its disposition in *Adams v. Evatt*, 511 U.S. 1001 (1994).

Adams arose from the Fourth Circuit's decision in *Adams v. Aiken*, 965 F.2d 1036 (4th Cir.1992). In *Adams v. Aiken* the Fourth Circuit, prior to *Sullivan*, held that a *Cage* error had occurred, but that *Cage* did not apply retroactively under either the first or the second *Teague* exception. Specifically, as to the second exception, the Fourth Circuit held that a *Cage* error did not affect "the *bedrock procedural elements* essential to the fairness of the proceeding." 965 F.2d 1312 (citation and internal quotation marks omitted).

This Court initially denied certiorari in *Adams*. 508 U.S. 974 (1993). Six days after the decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Court granted rehearing, and in a one-paragraph opinion, granted the petition for rehearing, granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals for the Fourth Circuit, and ". . . remanded [the case] to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Sullivan v. Louisiana*, 508 U.S. 275." Since the only claim made in the *Adams* petition for certiorari that related in any way to *Sullivan* was the claim that *Cage* should be applied retroactively, it is evident that the Court's action reflected the view that *Sullivan* had a bearing on the retroactivity issue. On remand, the Court of Appeals for the Fourth Circuit concluded that *Sullivan*'s recognition that *Cage* violations constitute "structural error" dictated that *Cage* was to be applied retroactively.

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[4] It is also the conclusion reached by the Second, Third, Fourth, Tenth, and Eleventh Circuits. *See Tillman v. Cook*, 215 F.3d 1116, 1121-1122 (11th Cir.2000).

Adams v. Evatt, 41 F.3d 175, 178 (4th Cir.1994).

Together, *Teague*, *Cage*, *Sullivan*, and this Court's action in *Adams* point ineluctably to the conclusion -- which the courts of appeals have unanimously adopted -- that *Cage* applies retroactively. Indeed, the Fifth Circuit itself has acknowledged that "the Supreme Court *has made it plain* that *Cage-Victor* errors fit within the second *Teague* exception." *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir.1997)(panel opinion adopted by *en banc* court in *Humphrey v. Cain*, *supra*). Under any reasonable construction of the AEDPA, where this Court's decisions so clearly necessitate retroactive application of a new rule, that rule has indeed been "made retroactive to cases on collateral review by the Supreme Court." The Fifth Circuit's contrary decision in this case thus conflicts with controlling decisions of this Court.

Moreover, as indicated above, the Fifth Circuit's decision that a successive petition raising a *Cage* issue may not be filed under 28 U.S.C. § 2244(b)(2)(A) is in direct conflict with the decision of the Ninth Circuit in *Nevius v. Sumner*, 105 F.3d 453 (9th Cir.1996), and in direct conflict with the decision of the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3rd Cir.2000).

In *Nevius*, a petitioner sought to raise a *Cage* issue in a successive petition. The Ninth Circuit granted leave to file the petition under § 2244(b)(2)(A), noting that the history of this Court's cases on the *Cage* issue indicated that *Cage* must be retroactive, and finding that the petitioner "has made a 'prima facie showing that the application satisfies the requirements of this subsection.'" *Id.* at 462.

West also presents an instance of a petitioner seeking to raise a *Cage* issue in a successive petition. After finding that *Cage* did indeed announce a new rule, the Third Circuit concluded that this Court had never explicitly held *Cage* to be retroactive -- " We are similarly unaware of any such precedent [explicitly stating that the *Cage* rule is to be applied retroactively]" *West*, *supra*, p.59.

However, the *West* court found that this was not the end of the inquiry, because the court was "not convinced that [the phrase] 'made retroactive' [as used in § 2244(b)(2)(A)] deserves the restrictive gloss applied by these [other circuit] courts in construing the term." *West, supra*, p.59. The *West* court then went on to find that this Court's decision in *Sullivan* compelled retroactive application of *Cage*. *West, supra*, pp.61-63.

The Fifth Circuit, however, has specifically rejected the Ninth Circuit's decision in *Nevius v. Sumner*, aligning itself instead with the First Circuit's decision in *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir.1998), and the Eleventh Circuit's ruling in *In re Hill*, 113 F.3d 181 (11th Cir.1997). In *Rodriguez*, the First Circuit rejected the filing of a habeas petition raising a *Cage* claim. Like the Fifth Circuit, the First Circuit specifically disagreed with *Nevius v. Sumner*, rejected the petitioner's reliance on *Sullivan* and *Adams*, and held that the statute required a decision by this Court directly addressing the question of retroactivity. Similarly, in *In re Hill*, the Eleventh Circuit held that its own prior ruling that *Cage* applies retroactively was unavailing in a successive habeas petition, and denied the petitioner leave to file.

The effect of these varying decisions is that in the nine states of the Ninth Circuit, and the three states and the other territories of the Third Circuit, a state prisoner can file a successive habeas petition raising a *Cage* claim, whereas in the five states that make up the First Circuit, the three comprised in the Fifth Circuit, and the three in the Eleventh Circuit, such a petition may not be filed. This Court should grant plenary review of this petition to resolve this conflict over an important issue of federal law.

II. THE RETROACTIVITY ISSUE IN THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

If the Court of Appeals for the Fifth Circuit is correct in its position that this Court has never determined (for purposes of § 2244 (b)(2)(A)) whether the rule of law announced in *Cage* is to be applied retroactively, then the reasons for granting this petition become all the more compelling. At least five circuits, the Third, the Fourth, the Fifth, the Tenth, and the Eleventh, have determined that *Cage* is to be given retroactive effect. Nevertheless, even if every other circuit follows their lead, federal relief will be unavailable to any state prisoner filing a successive petition. While one might hope that state courts addressing post-conviction petitions under their own procedures will adhere to rulings made by the federal Courts of Appeal, it is plain from the decision of the Louisiana Supreme Court in *State v. Penns*, *supra*, that this is not going to happen -- at least in Louisiana. Thus, in Louisiana, there is no remedy available to state prisoners -- in any court.

In short, whether any given habeas petitioner receives the constitutional protections to which he or she is entitled by virtue of *Cage* and *Sullivan* has become a question of judicial roulette, not a principled application of the laws.

Petitioner's claim that *Cage* is retroactive is surely substantial, indeed, every federal court to address the issue after *Sullivan* has so held. Ordinarily, such unanimity might be a reason for this Court to deny review of the issue. But here, the need for resolution of the retroactivity issue by this Court follows directly from the interpretation of the AEDPA adopted by the court below, which places a premium not on *what* the proper retroactivity rule is, but on *who* has announced the rule. If the AEDPA is to be so interpreted, then this Court has a special role and responsibility with respect to the resolution of retroactivity issues -- at least where, as here, the claim of retroactivity is

weighty.

Failure by this Court either to reverse the Fifth Circuit's interpretation of the AEDPA or to take on the merits of the retroactivity question would lead to an absurd result. The effect of allowing a ruling like the one below to stand unreviewed would be to create a system where, if a retroactivity question is so close and debatable that it engenders division in the lower courts that this Court ultimately resolves in favor of retroactivity, then the issue may be presented in successive habeas petitions. If, on the other hand, the case for retroactivity is so easy and obvious that the courts of appeals *all agree* and the issue is never addressed by this Court, a successive petition raising the issue is barred. In short, the better the petitioner's claim, the less chance he will have to raise it.[5]

No rational legislature could have intended to create such a system. To restore reason to the law, this Court has two choices: it may interpret the AEDPA to permit the courts of appeals to give effect to the clear import of this Court's decisions when they dictate (but do not directly rule on) the retroactive application of a new rule, or it may decide the retroactivity question itself. Leaving the Fifth Circuit's decision intact is not an acceptable third alternative.

[5] The Fourth Circuit, in an opinion denying a prisoner leave to file a successive petition raising a non-*Cage* claim because this Court had not directly decided the retroactivity issue involved, took note of the jurisprudential awkwardness its interpretation of the AEDPA created in cases presenting easy retroactivity questions: "Of course, it seems unlikely that the Supreme Court would grant certiorari to declare the applicability of a rule announced on direct review to collateral proceedings . . . lower federal courts uniformly rule in favor of collateral availability." *In re Vial*, 115 F.3d 1192, 1196, n. 8 (4th Cir.1997). Despite its recognition of this "*Catch 22*," the Fourth Circuit in *Vial* felt constrained to require a direct retroactivity ruling by this Court as a prerequisite to a successive petition.

CONCLUSION

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant Melvin Tyler's petition for a writ of certiorari.

New Orleans, Louisiana, this 28th day of August, 2000.

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Attorney for Petitioner
Melvin Tyler

APPENDIX A

U.S. COURT OF APPEALS
FILED
JUN 0 1 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31159
Summary Calendar

MELVIN TYLER,

Petitioner-Appellant,

versus

BURL CAIN, Warden, Louisiana
State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 97-CV-1549-G

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Melvin Tyler, Louisiana prisoner # 81668, appeals the dismissal of his petition under 28 U.S.C. § 2254. In 1976, Tyler was convicted of one count of second degree murder. He is continuing to serve his sentence of life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty years.

Tyler has requested federal habeas relief following the denial of his numerous state habeas petitions. This court has previously given Tyler permission to file a successive § 2254

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

application on the issues whether Cage v. Louisiana, 498 U.S. 39 (1990), should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under Cage and Victor v. Nebraska, 511 U.S. 1 (1990). The district court determined that, based upon Humphrey v. Cain, 138 F.3d 552 (5th Cir.)(en banc), cert. denied, 119 S. Ct. 348, 365 (1998), Cage was to be applied retroactively, but it denied relief under the standard set forth by 28 U.S.C. § 2254(d).

The district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir. 1999), which relies on In re Smith, 142 F.3d 832 (5th Cir. 1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.

Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).

For these reasons, only, the judgment of the district court denying habeas relief is **AFFIRMED**.

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

1998 SEP 10 P 12:53

LORETTA G. WHYTE
CLERK

MINUTE ENTRY
SEAR, CHIEF JUDGE
September 8, 1998

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MELVIN TYLER	*	CIVIL ACTION
VERSUS	*	NO. 97-1549
BURL CAIN, WARDEN	*	SECTION "G"

MEMORANDUM AND ORDER

Background

Petitioner Melvin Tyler, a prisoner currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana, was convicted on February 19, 1976 of one count of second degree murder and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. Tyler directly appealed his conviction to the Louisiana Supreme Court.[1] Following that appeal, he was resentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty (20) years.

Tyler subsequently filed six (6) applications for post-conviction relief in state court, all of which were denied. In his petition for federal habeas relief, Tyler raises the same two claims he raised in his final post-conviction application in state court. Prior to filing the federal petition, Tyler obtained permission from the United States Fifth Circuit Court of Appeals to file a successive writ.[2] The Fifth Circuit, however, limited his application to the issue of whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review, and, if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.[3]

Magistrate Judge Louis Moore, Jr. issued a Report and Recommendation in which he recommended that Tyler's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. Because petitioner has filed timely objections to the magistrate's Report and Recommendation, a de novo review of those portions of

[1] The petitioner raised the following arguments on appeal: 1) the trial court improperly denied his Motion to Quash an improper grand jury; 2) the trial court gave an unconstitutionally excessive sentence; and , 3) the trial court gave an improper jury instruction on specific intent. State v. Tyler, 363 So.2d 903 (La. 1978).

[2] In re Melvin Tyler, Doc. No. 97-00165 (U.S. App. 5th Cir. 1997).

[3] Id.

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the findings to which petitioner has objected is required.

Analysis

The first issue to be considered is whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of Tyler's case.[1]

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[1] In determining this, I am not limited solely to United States Supreme Court determinations on its retroactivity as in In re Smith, 142 F.3d 832. In Smith, petitioner was seeking writs from the Fifth circuit to file for a successive habeas application based on a similar allegedly unconstitutional "reasonable doubt" jury charge. In Smith, the Fifth Circuit adopted the view that:

> an application to file a second or successive habeas petition must point to a *Supreme Court decision* that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding.

Id. at 835, [emphasis added].

The Fifth Circuit additionally stated that Smith was required to make a "prima facie showing" that the Cage rule has been "made retroactive to cases on collateral review by the Supreme Court" as required by § 2244(b)(2)(A).

However, it is not before me to decide whether Tyler is permitted to file this successive *habeas* application in accordance with 28 U.S.C. § 2244(b)(2)(A). The Fifth Circuit has already granted him permission to do so. Nonetheless, they have limited his application to the issue of whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of his case

Since the time the Fifth Circuit granted authorization for Tyler to file his *habeas* application, that court had an opportunity to rule on the issue of whether Cage and Victor should be applied retroactively on collateral review. In Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1998), adopting the panel opinion, 120 F.3d 526 (5th Cir. 1997), the Fifth Circuit en banc held that Cage, as clarified by Victor, announced a new rule of constitutional law made retroactive to cases on collateral review. Id. and *See* Messick v. Cain, 1998 WL 473942, (E.D. La).

Therefore, the only remaining question is whether the jury instruction given at Tyler's trial was unconstitutional. In Cage, the Supreme Court held that an instruction containing questionable reasonable doubt language was unconstitutional, because it permitted finding guilt based upon a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment.

Tyler claims the trial court erroneously instructed the jury on reasonable doubt, and that this instruction violated the

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and if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.

Since I am not deciding whether to grant an application to apply for successive writs, I am not governed by 28 U.S.C. 2244(b)(2)(A). Thus, I am not limited to Supreme Court determinations on this issue as Smith was.

Fourteenth Amendment's due process clause by reducing the state's burden of proof against him, as discussed in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

Cage and Victor set the standard by which courts examine the "reasonable doubt" instructions. Cage and Victor affirmed the principle that the charge must not allow the jury to convict unless it is convinced that the evidence demonstrates guilt beyond a reasonable doubt. Victor modified Cage by leaving no uncertainty that the inquiry is "not whether the instruction 'could have' been applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."[5]

Using this standard, the Fifth Circuit decided Humphrey v Cain, 138 F.3d 552. In Humphrey, the Fifth Circuit sitting en banc held that the complained-of reasonable doubt instruction was unconstitutional, over-ruling prior cases. The jury charge given at Tyler's trial is identical to the charge on reasonable doubt given in Humphry. The issue in this case is whether Tyler's *habeas* application was filed too late to apply the Humphrey ruling.

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[5] Humphrey v. Cain, 120 F.3d 526, 531.

In Humphrey, the petitioner filed his habeas application prior to the April 24, 1996 effective date of the Anti-terrorism and Effective Death Penalty Act (AEDPA), which established a new standards of review for state court decisions in habeas cases. Thus, Humphrey's claims were analyzed under the old version of the habeas statute. The court noted this distinction in Humphrey when it stated,

> Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act. Of course, we do not have the occasion to measure how high those barriers might be. We note only that the . . . heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation.

Tyler's petition here was filed on March 18, 1997, after the April 24, 1996 effective date of AEDPA. Hence, in order for Tyler to prevail, he must surmount the "formidable barriers" erected in 28 U.S.C. § 2254 (d)(1).[6] In other words, Tyler must show the

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[6] 28 U.S.C. § 2254 provides:

> Whether jury instruction is unconstitutional and whether a new rule of law is to be applied retroactively are questions of law. On a question of law, this Court may not grant habeas relief with respect to a state court's determination unless the "state court's decision rested on a legal determination that was 'contrary to . . .

state court decision denying him relief on his Cage and Victor claim was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."

In petitioner's objections to the Magistrates Report and Recommendations, petitioner urges the court to use the Humphrey decision to grant him relief. Since Humphrey was decided under a different habeas standard than the one that applies in this case, Humphrey is inapplicable.

In reviewing petitioner's reasonable doubt instruction, I find his claim unavailing under Cage and its progeny in light of the standards governed by AEDPA. The disputed instruction in this case reads as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an *actual or substantial doubt*. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, *for which you could give good reason*. [Emphasis added.]

This instruction defined reasonable doubt through the use of phrases that have been disapproved in the past, including "grave uncertainty," "moral uncertainty," and "actual or substantial doubt," combined with the explanation that the jury could acquit only if it had "serious doubt, for which you could give good reason." Petitioner argues that this "good reason" limitation on reasonable doubt, in conjunction with other errors, lowered the standard of proof required by due process.

In analyzing this charge under a more stringent AEDPA

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clearly established Federal law, as determined by the Supreme Court.'" 28 U.S.C. § 2254 (d) (1). Lindh v. Murphy, __ U.S. __, 117 S.Ct. 2059 (1997).

standard, the charge is able to pass constitutional muster. Terms such as "substantial basis" in connection with "grave uncertainty" has been recently allowed by the Fifth Circuit, as has "grave uncertainty" used with "moral certainty". *See* Weston v. Ieyoub, 69 F.3d 73 (5th Cir. 1995); and Gaston v. Whitley, 67 F.3d 121 (5th Cir. 1995), cert. denied, 518 U.S. 1023, 116 S.Ct. 2561, 135 L.Ed.2d 1078 (1996). The Fifth Circuit has also upheld instructions using the phrases "substantial doubt" together with "moral certainty." Schnider v. Day, 73 F.3d 610 (5th Cir. 1996); and Bias v. Ieyoub, 36 F.3d 479 (5th Cir.1994).

Moreover, other circuits have refused to reverse convictions with articulation demanding reasonable-doubt instruction such as the one in this case. *See* Chalmers v. Mitchell, 73 F.3d 1262, 1268-69 (2d Cir. 1996); __ U.S. __, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996); Beverly v. Walker, 118 F.3d 900 (2d Cir.1997); and Vargas v. Keane, 86 F.3d 1273,(2d Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996). The Second Circuit held that an instruction survived due process scrutiny in spite of its characterization of reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury

room." Vargas at 1277-79.

In Humphry these three phrases read in connection with the good reason limitation was found to deny the petitioner a constitutional jury trial. They found that this jury instruction

> "define[d] reasonable doubt with all the phrases that (although panned by the Court) survived constitutional attack in Victor, but [they] are coupled with an additional potent qualifier. Arguably, jurors were not allowed to entertain doubt without being able to express a good reason. The abiding conviction of guilt to a moral certainty could abide only if the juror could offer a good explanation."
> Humphry at 531.

The Humphry court, in determining the instruction's constitutionality, used the more relaxed standard in Victor.[7] However, when analyzing this charge under a more stringent AEDPA standard, petitioner is not able to surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act.

Therefore, after reviewing the record and the report of the Magistrate Judge, I find that the state court decision denying Tyler relief was not contrary to any clearly established federal law. Accordingly, Tyler's petition for habeas relief is denied.

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[7] Messick at 3.

After a de novo review of the record, the applicable law, the Report and Recommendation of Magistrate Judge Moore, and Plaintiff's objections to the report, I approve the Magistrate Judge's Report and Recommendation and adopt it as my opinion.

Accordingly,

IT IS ORDERED that plaintiff's suit is DISMISSED WITH PREJUDICE.

MOREY L. SEAR

CHIEF JUDGE